

Tuesday Morning Session, 9:15 a.m., November 15, 1966

(Thereupon the following proceedings  
were had in the absence of the jury:)

THE COURT:           Mr. Reporter, does  
the record reflect the presence of counsel and  
the defendant.

Gentlemen, we have reached the point  
now where will hear the motions of the defendant,  
if any.

Counselor Bailey or Sherman?

MR. BAILEY:           Your Honor, the first  
motion that the defense presents relates to -- the  
exhibit number doesn't occur to me offhand -- which  
consists of a written statement typed and initialed  
by the defendant and others.

There was a page therein which was  
admitted over objection relating to conversation  
between the defendant and his interrogator, who-  
ever that may have been, inquiring about a relation-  
ship with a Susan Hayes.

We contended at the time the evidence  
was inadmissible in a second degree case, but in  
any event the substance of it remains that the  
defendant was asked if he knew a Susan Hayes.

And he said he did, she was a good friend, that he bought her a watch and that was the end of it.

Susan Hayes has not appeared in this case. All of the conversation relating to her, as derived from that document, is now irrelevant and immaterial.

But there is another facet to the matter. It is very doubtful to me that anybody in the City of Cleveland fails to recollect the prominent part that Susan Hayes, the so-called mystery woman, paramour, or what have you, played in the original trial.

At least one of the jurors said on query that he recalled something about activities of the defendant other than professional, which were broadcast back in 1954.

We were not permitted to get more specific on the voir dire, but the inference is plain that these refer to the activities of the defendant as they were described in the last trial.

The reference to Susan Hayes, unsupported by any evidence connecting it to this case,, unsupported by any suggestion that she played any role in the murder of Marilyn Sheppard, as a motive-participant or anything else, is extremely damaging

to the defendant, because even though the jurors who professed that they had forgotten there was a Susan Hayes, certainly remember it now.

We feel that that evidence should be stricken, and that a very careful and thorough instruction should be given to this jury delineating the reasons for striking this evidence; instructing them that Susan Hayes has nothing to do with this case and they are not to consider her or any other woman in connection with evidence against the defendant, except, of course, for the deceased Marilyn Sheppard.

I feel that on the state of the record now the innuendo remains, despite the absence of any evidence on that, solely because of the unique history of this case, it is extremely dangerous evidence, and that your Honor should strike it out.

That is our first motion.

THE COURT: Overruled.

MR. BAILEY: Now, the second motion relates to the question which was permitted over objection to one of the Houks, I believe it was J. Spencer Houk, wherein he was asked, "Did you hear the brother of the defendant say, 'Sam, did you have anything to do with this?' and Sam replied,

'Hell no'?"

This evidence we think is inadmissible. We thought so at the time and we so stated it for the record, as it is extremely damaging, because although there is no competent legal basis for the admission of such evidence, it being an accusation or a question accusation, coupled with a flat denial, which is not admissible in any jurisprudence, the plain inference remains that at least the brother of the defendant thought he was capable of participation in this kind of butchering; and as certainly that is damaging insofar as the jury is concerned, especially since that brother did not appear and did not testify.

Indeed we saw no need to call him simply to deny evidence that we don't think is admissible. We think that evidence should be stricken out.

THE COURT: Before ruling on the second motion, let the record further show that the defendant's first motion addressed itself to State's Exhibit 27, which was excised and amended from its original form.

Let the record further show that the defense on cross examination inquired into a portion of the statement, the original statement,

which the Court had ordered excised, and that is in further support of the Court's ruling overruling the motion, couched in the first motion of the defendant.

With respect to the second motion of the defendant just presented, the Court overrules the motion.

Please proceed, Counselor.

MR. BAILEY: The third motion of the defendant relates to that testimony of Robert Schottke, wherein he told the jury that at or about 3:00 on the afternoon of July 4th he approached the defendant Sam Sheppard accused him of murder, giving the benefit of his judgment as of that time that in his opinion Sam was guilty.

The opinion of a police officer is not admissible, of course, nor is the accusation of a police officer, when it is flatly denied. We objected to this evidence. We object to it again now, and suggest that it is damaging. It is damaging for the following reason:

The jury may well infer that a police officer, being experienced in matters of murder, made a judgment based on information that has been kept from them, or a judgment based on information



that he alone as some kind of expert could interpret, and may draw some kind of inference or innuendo from the fact that Robert Schottke, whoever he is, saw fit to walk in at that time and tell Sam Sheppard that in his judgment he was a murdered. Sam Sheppard denied the accusation. There was nothing equivocal about the denial. The evidence was admitted. It was prejudicial. We think it should be stricken.

We think the jury should be very thoroughly instructed to disregard it, to give it no weight, that it is meaningless, it has nothing to do with this case; and we so move.

THE COURT: Let the record show that the motion with respect to Officer Schottke's statement is hereby overruled. And let the record further reflect that the motion, second motion, relating to conversation overheard by Mr. Houk concerning the question asked by Doctor Richard of Doctor Sam, could not in any fashion be interpreted as accusatory in nature. It was merely an inquiry on the part of Doctor Richard.

Both motions are overruled.

Please proceed, Counselor.

MR. BAILEY: Your Honor, our fourth

and final motion relates to a renewal of our motion for directed verdict. This motion was presented at the close of the evidence presented by the State of Ohio, and as the record reflects, at that time denied.

As a matter of law we contend that no case of homicide, indeed, any possible included crime, has been demonstrated to that minimum level of sufficiency against the defendant Sam Sheppard.

The Chief Justice of the Ohio Supreme Court writing for a dissenting body pointed out quite cogently that nobody since the 4th day of July, 1954, has ever undertaken to state a set of facts and circumstances which could possibly exclude every hypothesis of innocence, and prove the guilt of the defendant to that point where reasonable men would have a factual question presented to them.

Chief Justice Taft further said that the best that was shown was that Sheppard could have killed his wife. And as he said in his opinion, this is not enough evidence to go to the jury in a civil case, let alone a criminal case.

Now, the presentation of this motion,

where the only evidence which the State can possibly rely upon is circumstantial, because the only direct evidence in this case is that of the defendant as proven by the State; of course, if that is accepted the defendant is not guilty as a matter of fact as well as law. The only evidence is circumstantial.

The presentation of the motion challenging the sufficiency of that evidence, is a challenge to counsel for the State of Ohio to state for the Court and for the record those facts and circumstances upon which the State of Ohio relies.

When I presented this motion to your Honor at the close of the State's case, Mr. Corrigan spent 182 seconds mentioning briefly his judgment as to inconsistent statements of the defendant, and some remarks about a watch.

Neither of these items, singly or taken together, prove any case against the defendant.

The overwhelming weight of the evidence is entirely inconsistent with guilt, and whereas in the last trial, as was pointed out correctly or not by your Court of Appeals of Cuyahoga County, there was at least a conflict as to whether or not he was injured.



The State has produced not one shred of medical evidence to contradict Doctor Elkins, the neurologist, Doctor Koch, the dentist, Doctor Foster whose testimony was read in the record, Doctor Steve Sheppard, three nurses, all of whom showed beyond question that injuries were sustained.

Now, this is not a case where the State of Ohio can suddenly suggest that perhaps there were three or four other participants. The indictment charges Sam Sheppard, and Sam Sheppard alone. It does not charge John Doe. It does not charge accessories before and after the fact.

It is inconceivable that the defendant could possibly have injured himself to the extent that the overwhelming weight of the evidence shows, and although credibility is a question for the jury, their power is not unlimited to simply cast aside with no demonstrable reason for so doing, an accumulation of testimony from men whose integrity and competency has not even been challenged or scratched by the state.

Now, aside from the weight of the evidence, every single piece of evidence that the State has presented, from its first witness,

Doctor Adelson, who proved murder and only murder, which we do not deny, to his last witness, is equally consistent right down the line with innocence as well as guilt, and that is not a circumstantial case in any court of law in the United States.

There never was enough evidence in this case; but whatever there was in the first trial, your Honor is certainly familiar with those opinions as you have demonstrated, there is less in this trial.

An American citizen cannot be convicted on speculation, guess work, or wild ideas.

I suggest to this Court that neither Mr. Corrigan, nor indeed the Court, is able to state those facts and circumstances which your law requires, facts and circumstances which inexorably point to the defendant and only the defendant, and are inconsistent with his guilt, anything that constitutes proof of guilt. It isn't there; it can't be done. It certainly can't be done in 180 seconds. I don't think it can be done in an hour. But I think the State has an obligation to state now and for the record just what it is that is being given to this jury to decide.

Now, the question of sufficiency of the evidence at its threshold is one for your Honor. It is not for a jury.

This is not a case where there are serious questions of credibility to be resolved. If we took every State witness, and assumed the truth of every fact that he testified to, and even granted credibility to the opinions of these witnesses, there is no case against the defendant.

And I say again Mr. Corrigan or Mr. Spellacy for the State cannot state such a case. No court has ever stated such a case. No prosecutor has ever stated such a case, and it cannot be stated now.

And until that point is reached, until some kind of logical presentation is shown, that evidence which if it went all in favor of the State, asking the jury to stretch its imagination on every question of credibility, and to draw every possible inference from every piece of evidence upon which the State has or may rely, does not prove Sam Sheppard killed his wife.

As a matter of fact, as Chief Justice Taft has said, the State of Ohio with its own evidence has excluded in the last trial, and

certainly in this one to a larger degree, every reasonable hypothesis other than innocence.

And if I have overlooked some theory, if there is some proof staring me in the face as defense counsel, and my associate Mr. Sherman, and indeed the defendant, which we do not see because we are blinded in his cause, then it will be a simple matter for the State of Ohio to enlighten us in this regard.

But they can't do it, they never could do it, and they cannot do it now. They cannot give your Honor a reason to allow this case to go to the jury, and I feel and I feel very strongly the court has a duty and an obligation to discharge this defendant for failure of proof; and we so move.

THE COURT: Let the record show that with all due respect and deference to Judge Taft's opinion, minority opinion, in 1956, in connection with the first Sheppard case, reported at 165 Ohio State at page 293, that Judge Taft's opinion was disagreed with by five out of seven judges, in 1956.

Not only for that reason, however, but the Court believes that this is not the Sheppard case of 1954. This is the Sheppard case of 1966,

new, and with a new start. The Court believes that this record reflects that there is circumstantial evidence in this case of a different character and nature than that which was adduced in 1954, stronger in character, in some areas.

Accordingly the motion for discharge is overruled.

Anything further, counselors?

MR. BAILEY: No, your Honor.

(Thereupon the jury was brought into the courtroom, and the following proceedings were had in the presence and hearing of the jury:)

THE COURT: Good morning, ladies and gentlemen.

THE JURY: Good morning.

THE COURT: Ladies and gentlemen of the jury, we have reached that point in the proceeding where we will now hear the closing arguments or summations of counselors.

You will recall that at the very outset and commencement of this proceeding you heard opening statements, and the Court instructed you at that time that neither opening statements nor closing arguments, if we reached that point in this proceeding, would be considered by you as evidence